OBNET SDN BHD v. TELEKOM MALAYSIA BHD

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
VERNON ONG LAM KIAT JCA
HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEAL NO: W-02(NCC)(A)-1698-08-2017]
7 SEPTEMBER 2018

CIVIL PROCEDURE: *Discovery – Confidential documents – Whether confidentiality a ground to resist discovery – Whether documents necessary for fair disposal of proceedings – Whether disclosure of documents would involve breach of confidence – Whether disclosure warranted by demands of justice – Whether disclosure through court order permissible*

ARBITRATION: *Arbitration tribunal – Jurisdiction – Arbitration proceedings – Application for discovery of documents in relation to earlier court proceedings – Arbitrator refused disclosure – Whether confidentiality a ground to resist discovery – Whether documents necessary for fair disposal of proceedings – Whether disclosure of documents would involve breach of confidence – Whether disclosure warranted by demands of justice – Whether disclosure through court order permissible – Arbitration Act 2005, s. 11*

The appellant, Obnet Sdn Bhd ('Obnet'), was appointed by the Selangor State Government ('State Government') to provide a high speed broadband network for all the various government departments and statutory bodies of the State Government, pursuant to an internet access agreement and a subscription agreement ('SELNET agreements'). Under the project ('SELNET project'), Obnet was required, at its own cost, to install all the equipment necessary to allow the Government facilities to have high speed internet access. In return, the State Government agreed to subscribe for the broadband services for a period of 20 years. In order to provide the said services, Obnet appointed the respondent ('TM') to design and build a network infrastructure for the SELNET project *via* the Metro Ethernet services agreement dated 19 April 2007. In 2010, Obnet filed a civil suit at the Shah Alam High Court ('Shah Alam suit') against the State Government for breach of the SELNET agreements. The Shah Alam suit was eventually settled. The terms of settlement were recorded in the settlement agreement. Parties also entered into a consent judgment, which provided that the terms of the settlement agreement shall be confidential and shall not be disclosed to any third party without the written consent of the other party to the settlement agreement. In July 2013, Obnet commenced arbitration proceedings against TM. In the course of the arbitration proceedings, TM sought discovery of the settlement agreement to determine whether Obnet had already been compensated for their claims. The arbitrator refused the application and TM then applied to the court under s. 11(1)(b) of the

Arbitration Act 2005 ('AA 2005') for discovery of the said settlement agreement. The High Court allowed TM's application on the grounds that: (i) confidentiality was not the determinative factor in a discovery application; (ii) the proper test that should have been adopted by the arbitral tribunal was whether the settlement agreement was necessary for the fair disposal of the arbitration proceedings; and (iii) the High Court had the jurisdiction to order discovery of the settlement agreement pursuant to s. 11 of the AA 2005 notwithstanding the presence of the consent judgment. Hence, the appeal by Obnet.

Held (allowing appeal; setting aside order of High Court)

Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) It is settled law that confidentiality itself is not a ground to resist discovery of a document. If the document is necessary for the fair disposal of the proceedings or is required by the demands of justice, discovery can be ordered notwithstanding confidentiality. However, in the exercise of discretion to order discovery, regard must be taken of the fact that disclosure of confidential documents may involve a breach of confidence. The argument that to order discovery would be a collateral attack on the consent judgment, had no merit. It was implicit in the consent judgment that a court of law or an arbitral tribunal could order disclosure if warranted by the demands of justice. This was due to the fact that there was no total prohibition in the disclosure of the settlement agreement, which could be disclosed with the consent of the parties. In any case, the consent order could not preclude the court from ordering disclosure as the court had an inherent power to prevent injustice. So, disclosure through a court order was permissible. (paras 13 & 14)

(2) Disclosure could only be ordered if the risk of injury to public interest is outweighed by the injury to public interest in the administration of justice (*Conway v. Rimmer and Another*). Although the State Government was not a party to the said arbitration proceedings, there appeared to be no impediment to the State Government being made a respondent to the disclosure application in the High Court. It was no answer to say that the State Government could have applied to intervene in the disclosure proceedings. Having had notice of the arbitrator's concerns about the prejudice to the State Government, it was prudent for the State Government to be added as a respondent. The failure to do so, in the circumstances, disentitled TM to the order for discovery. (paras 19 & 20)

(3) The judge was bound by the arbitrator's finding that the disclosure of the settlement agreement ought not to be allowed as such disclosure would be prejudicial to the State Government. In principle, s. 11 of AA 2005 is designed to support and facilitate the arbitral process and not to displace it. The approach, in the context of s. 11, must be not to

encroach on the procedural powers of the arbitrators but to reinforce them. The relief sought must be of an interim nature and, by implication, not permanent. It is plain that the interim measures are not intended to displace the powers of the arbitrator and are certainly not there for the High Court to exert some supervisory function over the arbitral process. In the circumstances, the judge ought to have declined to order discovery. (paras 23 & 26)

(4) Except for noting that TM was concerned about Obnet making double claims which were not allowed by law, the arbitrator did not consider the issue of whether the settlement agreement was necessary or relevant to the arbitration proceedings in any depth. The judge, on the other hand, concluded that the settlement agreement was relevant as it could show how much of the loss that Obnet was seeking from TM in the arbitration had already been compensated by the State Government so that there was no compensation twice over for the same loss. (para 27)

(5) The overriding principle is that the release of one concurrent tortfeasor did not have the effect in law of releasing another concurrent tortfeasor and the release of one contract-breaker did not have the effect of releasing a successive contract-breaker. It all depended on whether the full measure of damages had been received by the claimant, which may then disentitle him to maintain a claim against the other tortfeasor or contract-breaker. In determining whether full measure of damages has been received, a distinction must be made between an action which culminates in a court judgment and one which culminates in a compromise. These were matters for the consideration and determination by the arbitrator. (para 29)

(6) Any information as to whether the full measure of damages had been received by Obnet could be obtained through the examination of witnesses of Obnet in the arbitral proceedings without the need to reveal the whole of the settlement agreement. If there was wilful refusal by the witnesses to do so, TM would then be at liberty to seek from the arbitrator an order to look at the documents. If necessary for the fair disposal of the case, the arbitrator, in those circumstances could order disclosure subject to the appropriate safeguards. This would be in keeping with the approach and mind-set to preserve confidentiality and to order discovery with the protective measures only as a last resort. For this reason as well, it was unnecessary to order disclosure at the time it was sought. (para 31)

***Bahasa Malaysia** Headnotes*

Perayu, Obnet Sdn Bhd ('Obnet'), dilantik oleh Kerajaan Negeri Selangor ('Kerajaan Negeri') untuk menyediakan jaringan jalur lebar dengan kelajuan tinggi untuk semua jabatan kerajaan dan badan berkanun Kerajaan Negeri, menurut perjanjian capaian internet dan perjanjian langganan ('perjanjian

A SELNET'). Bawah projek tersebut ('projek SELNET'), Obnet diperlukan, atas perbelanjaannya sendiri, memasang kesemua alatan yang diperlukan untuk membolehkan kemudahan Kerajaan mempunyai capaian internet dengan kelajuan tinggi. Sebagai balasan, Kerajaan Negeri bersetuju melanggan perkhidmatan jalur lebar tersebut untuk tempoh 20 tahun. Untuk
B memberi perkhidmatan tersebut, Obnet melantik responden ('TM') untuk mereka dan membina infrastruktur rangkaian untuk projek SELNET tersebut melalui perjanjian perkhidmatan Metro Ethernet bertarikh 19 April 2007. Pada 2010, Obnet memfailkan guaman sivil di Mahkamah Tinggi Shah Alam ('guaman Shah Alam') terhadap Kerajaan Negeri atas pelanggaran
C perjanjian SELNET. Guaman Shah Alam kemudiannya diselesaikan. Terma-terma penyelesaian direkodkan dalam perjanjian penyelesaian. Pihak-pihak juga memasuki penghakiman persetujuan, yang memperuntukkan bahawa terma-terma perjanjian penyelesaian adalah rahsia dan tidak boleh didedahkan kepada mana-mana pihak ketiga tanpa persetujuan bertulis pihak yang satu lagi dalam perjanjian penyelesaian. Pada Julai 2013, Obnet
D memulakan prosiding timbang tara terhadap TM. Semasa perjalanan prosiding timbang tara, TM memohon penzahiran perjanjian penyelesaian untuk menentukan sama ada Obnet telah pun dipampas untuk tuntutannya. Penimbang tara menolak permohonan itu dan TM kemudian memohon ke mahkamah bawah s. 11(1)(b) Akta Timbang Tara 2005 ('Akta') untuk
E penzahiran perjanjian penyelesaian tersebut. Mahkamah Tinggi membenarkan permohonan TM atas alasan-alasan bahawa (i) kerahsiaan bukan faktor penentu dalam permohonan penzahiran; (ii) ujian wajar yang sepatutnya digunakan oleh tribunal timbang tara adalah sama ada perjanjian penyelesaian perlu untuk pelupusan prosiding timbang tara yang adil dan
F (iii) Mahkamah Tinggi mempunyai bidang kuasa untuk memerintahkan penzahiran perjanjian penyelesaian menurut s. 11 Akta walaupun terdapatnya penghakiman persetujuan. Oleh itu, Obnet merayu.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi)

G **Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:**

(1) Adalah undang-undang matan bahawa kerahsiaan itu sendiri bukan alasan untuk menolak penzahiran satu-satu dokumen. Jika dokumen itu perlu untuk pelupusan prosiding secara adil atau diperlukan untuk
H keadilan, penzahiran boleh diperintahkan walaupun rahsia. Walau bagaimanapun, dalam melaksanakan budi bicara untuk memerintahkan penzahiran, fakta bahawa pendedahan dokumen-dokumen rahsia akan melibatkan kemungkiran terhadap keyakinan perlu dipertimbangkan. Hujahan bahawa untuk memerintahkan penzahiran akan menyebabkan
I serangan kolateral terhadap penghakiman persetujuan, tidak bermerit. Tersirat dalam penghakiman persetujuan bahawa mahkamah undang-undang atau tribunal timbang tara boleh memerintahkan pendedahan jika wajar demi keadilan. Ini adalah kerana fakta bahawa tiada larangan

menyeluruh dalam mendedahkan perjanjian penyelesaian, yang boleh didedahkan dengan persetujuan pihak-pihak. Walau apa pun, perintah persetujuan tidak boleh menghalang mahkamah daripada memerintahkan pendedahan kerana mahkamah mempunyai kuasa sedia ada untuk menghalang ketidakadilan. Oleh itu, pendedahan melalui perintah mahkamah dibenarkan.

(2) Pendedahan hanya boleh diperintahkan jika risiko kerugian pada kepentingan awam diatasi kerugian pada kepentingan awam dalam pentadbiran keadilan (*Conway v. Rimmer and Another*). Walaupun Kerajaan Negeri bukan pihak dalam prosiding timbang tara, tiada halangan untuk Kerajaan Negeri dimasukkan sebagai responden dalam permohonan pendedahan di Mahkamah Tinggi. Tidak wajar untuk menyatakan Kerajaan Negeri sepatutnya memohon untuk campur tangan dalam prosiding pendedahan. Setelah menerima notis tentang kekhuatiran penimbang tara mengenai prejudis pada Kerajaan Negeri, adalah wajar untuk Kerajaan Negeri ditambah sebagai responden. Kegagalan berbuat demikian, menidakkan TM untuk perintah penzahiran.

(3) Hakim terikat dengan dapatan penimbang tara bahawa penzahiran perjanjian penyelesaian tidak sepatutnya dibenarkan kerana penzahiran sedemikian akan memprejudis Kerajaan Negeri. Secara prinsip, s. 11 Akta digubal untuk menyokong dan memudahkan proses timbang tara dan bukan untuk menggantikannya. Pendekatan tersebut, dalam konteks s. 11, sepatutnya bukan untuk mencerobohi kuasa-kuasa prosedur penimbang tara tetapi untuk memperkukuhkannya. Relief yang dipohon perlu bersifat sementara dan, melalui implikasi, bukan tetap. Jelas bahawa tindakan sementara tidak diniatkan untuk menggantikan kuasa-kuasa penimbang tara dan jelas tidak wujud untuk Mahkamah Tinggi menggunakan fungsi penyeliaan terhadap proses timbang tara. Dalam keadaan tersebut, hakim sepatutnya menolak untuk memerintahkan penzahiran.

(4) Kecuali untuk memerhati bahawa TM khuatir tentang Obnet membuat tuntutan berganda yang tidak dibenarkan dari segi undang-undang, penimbang tara tidak mempertimbangkan isu sama ada perjanjian penyelesaian perlu atau relevan dengan prosiding timbang tara dalam apa cara pun. Sebaliknya, hakim memutuskan bahawa perjanjian penyelesaian relevan kerana perjanjian itu boleh menunjukkan kerugian yang Obnet tuntut daripada TM dalam timbang tara telah pun dipampas oleh Kerajaan Negeri agar tiada pampasan berganda untuk kerugian yang sama.

(5) Prinsip utama adalah pelepasan seorang pelaku tort bersama tiada kesan di sisi undang-undang dalam melepaskan seorang lagi pelaku tort bersama dan pelepasan seorang pelanggar kontrak tiada kesan melepaskan pelanggar kontrak seterusnya. Kesemuanya bergantung pada

A sama ada ganti rugi menyeluruh telah diterima oleh penuntut, yang boleh menafikannya daripada mengekalkan tuntutan terhadap pelaku tort satu lagi atau pelanggar kontrak. Dalam menentukan sama ada ganti rugi menyeluruh telah diperoleh, perbezaan perlu dibuat antara tindakan yang menjurus pada penghakiman mahkamah dan satu yang membentuk
B kompromi. Ini adalah perkara-perkara untuk pertimbangan dan penentuan penimbang tara.

(6) Apa-apa maklumat sama ada ganti rugi menyeluruh telah diterima Obnet boleh didapati melalui pemeriksaan saksi-saksi Obnet dalam prosiding timbang tara tanpa keperluan mendedahkan keseluruhan perjanjian
C penyelesaian. Jika terdapat keengganan sengaja oleh saksi-saksi untuk berbuat demikian, TM akan mempunyai kebebasan memohon daripada penimbang tara satu perintah untuk melihat dokumen-dokumen tersebut. Jika perlu untuk pelupusan kes secara adil, penimbang tara, dalam keadaan itu, boleh memerintahkan pendedahan tertakluk pada
D perlindungan sewajarnya. Ini selari dengan pendekatan dan penetapan untuk memelihara kerahsiaan dan untuk memerintahkan penzahiran dengan perlindungan hanya sebagai langkah terakhir. Untuk alasan ini juga, perintah pendedahan tidak perlu diberi pada masa permohonan dibuat.

E **Case(s) referred to:**

Alfred Crompton Amusement Machines Ltd v. Customs and Excise Comrs (No. 2) [1973] 2 All ER 1169 ***(refd)***

BA Rao & Ors v. Sapuran Kaur & Anor [1978] 1 LNS 14 FC ***(refd)***

Channel Tunnel Group Ltd v. Balfour Beatty Construction [1993] AC 334 ***(refd)***

F *Conway v. Rimmer and Another [1968] 1 All ER 874* ***(refd)***

D v. National Society for the Prevention of Cruelty to Children [1977] 1 All ER 589 ***(refd)***

Heaton v. Axa Equity and Law [2002] 2 All ER 961 ***(refd)***

Jameson (executors of Jameson (decd)) v. Central Electricity Generating Board (Babcock Energy Ltd, Third Party) [1999] 1 All ER 193 ***(refd)***

Kheng Chwee Lian v. Wong Tak Thong [1983] 2 CLJ 191; [1983] CLJ (Rep) 195 FC
G ***(refd)***

Law Mun & Ors v. Chua Lai Seng & Ors [1984] 1 LNS 10 HC ***(refd)***

Property Alliance Group Ltd v. Royal Bank of Scotland Plc [2015] EWHC 321 ***(refd)***

Science Research Council v. Nasse [1979] 3 All ER 673 ***(refd)***

Suruhanjaya Sekuriti v. Datuk Ishak Ismail [2016] 3 CLJ 19 FC ***(refd)***

H **Legislation referred to:**

Arbitration Act 2005, ss. 8, 11(1)(b), (2)

Rules of Court 2012, O. 24 r. 15

For the appellant - S Murthi & Ahmad Hanafi Lop Ahmad; M/s S Murthi & Assocs

For the respondent - G Vijay Kumay & Chan Mun Yew; M/s Lee Hishammuddin Allen & Gledhill

I *[Editor's note: For the High Court judgment, please see Telekom Malaysia Bhd v. Obnet Sdn Bhd [2017] 1 LNS 1491 (overruled).]*

Reported by S Barathi

JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] This appeal was a consequence of the decision of the Kuala Lumpur High Court dated 27 July 2017. The said decision arose from an originating summons instituted by the respondent ("TM") premised on s. 11 of the Arbitration Act 2005 ("AA 2005"). The High Court had allowed TM's application for discovery of a settlement agreement dated 4 September 2015 ("settlement agreement") pursuant to s. 11 of AA 2005.

[2] Aggrieved with this decision, the appellant ("Obnet") filed the instant appeal. After hearing the parties and taking into consideration the written submissions, we allowed the appeal and set aside the order of the High Court. Our reasons for doing so now follow and will constitute the judgment of the court.

Background

[3] The background leading to the filing of the present proceedings can be summarised as follows. Obnet was appointed by the Selangor State Government ("State Government") to provide a high-speed broadband network for all the various government departments and statutory bodies of the State Government, pursuant to an internet access agreement and a subscription agreement (collectively known as the "SELNET agreements"). The project was known as the SELNET project. Under this project, Obnet was required, at its own cost, to install all the equipment necessary to allow the government facilities to have-high speed internet access. In return, the State Government agreed to subscribe for the broadband services for a period of 20 years.

[4] In order to provide the said services, Obnet appointed TM to design and build a network infrastructure for the SELNET project *via* the Metro Ethernet Services Agreement dated 19 April 2007 ("Metro-E agreement").

[5] In 2010, Obnet filed a civil suit at the Shah Alam High Court ("Shah Alam suit") against the State Government for breach of the SELNET agreements. The Shah Alam suit was eventually settled. The terms of settlement were recorded in the settlement agreement dated 4 September 2015. Parties also entered into a consent judgment. The consent judgment provided that the terms of the settlement agreement shall be confidential and shall not be disclosed to any third party without the written consent of the other party to the settlement agreement.

[6] In July 2013, Obnet commenced arbitration proceedings against TM. Obnet claimed, *inter alia*, that TM had breached the Metro-E agreement; had unlawfully procured the State Government to breach the SELNET agreements, unlawfully interfered with the SELNET agreements and unlawfully used confidential information pertaining to the SELNET project.

In the course of the arbitration proceedings, TM sought discovery of the settlement agreement to determine whether Obnet had already been compensated for their claims. This application was refused by the learned arbitrator. TM then applied to the court under s. 11(1)(b) of AA 2005 for discovery of the said settlement agreement.

At The High Court

[7] After hearing arguments of the parties, the High Court ordered discovery of the settlement agreement on *inter alia* the following grounds:

(i) Confidentiality is not the determinative factor in a discovery application;

(ii) The proper test that should have been adopted by the arbitral tribunal was whether the settlement agreement was necessary for the fair disposal of the arbitration proceedings; and

(iii) The High Court had the jurisdiction to order discovery of the settlement agreement pursuant to s. 11 of the AA 2005 notwithstanding the presence of the consent judgment.

[8] The learned judge also ordered special measures to preserve the confidentiality of the settlement agreement as follows:

(i) The settlement agreement is to be disclosed in the arbitration proceedings only and it is to be redacted by the learned arbitrator as he deems fit, before being disclosed to TM;

(ii) TM is not allowed to make copies of the settlement agreement; and

(iii) TM is ordered to give an undertaking that it would not disclose any information contained in the settlement agreement to any third party.

The Instant Appeal

[9] Before us, the decision of the High Court was assailed by the appellant on a number of grounds. These grounds were summarised by the appellant in the following fashion:

(i) TM's originating summons proceeding is a collateral attack on a valid and subsisting Shah Alam High Court judgment dated 7 September 2015 entered between Obnet and the Selangor State Government. The Kuala Lumpur High Court cannot 'alter', 'vary' or 'modify' a perfected Shah Alam High Court Order under s. 11(1)(b) of AA 2005;

(ii) The Kuala Lumpur High Court's decision has created a situation where Obnet is presently faced with obeying two conflicting court orders of competent jurisdiction on the same subject-matter, namely the settlement agreement dated 4 September 2015;

(iii) Section 11(1) AA 2005 only provides for interim reliefs that may be granted by the Kuala Lumpur High Court, whereas the order for production and discovery of the settlement agreement is of a permanent nature, which is beyond the powers provided under s. 11(1) AA 2005; and

(iv) The discovery and production of the settlement agreement to TM in the arbitration proceedings is not necessary and not relevant at the present stage of the KLRCA arbitration proceedings.

[10] Although the grounds of challenge were set out as such, the arguments put forward in the written and oral submissions took a different form. We nevertheless found it more convenient to take the grounds of challenge together and in the fashion as follows.

[11] The first complaint of any merit was that with the granting of the order for disclosure, the State Government was prejudiced as it was not a party to the disclosure proceedings in the High Court. In fact, the disclosure of the settlement agreement was objected to by the State Government as evident by the letter dated 8 May 2017 issued by the State Legal Adviser's Office. This was duly noted by the learned arbitrator who took the position that any such disclosure will cause prejudice to the State Government as they were not a party and not represented in the arbitration proceedings between Obnet and TM. Curiously, the State Government was also not made a respondent to the disclosure application in the High Court although it was known to all that there was the court order in the Shah Alam suit preventing disclosure of the settlement agreement without written consent of the other party.

[12] So how did the learned judge deal with this issue? The learned judge accepted the position on confidentiality as advanced by the English cases of *Property Alliance Group Ltd v. Royal Bank of Scotland Plc* [2015] EWHC 321 (Ch) and *Science Research Council v. Nasse* [1979] 3 All ER 673 and came to the following view at para 18:

> 18. It will be seen therefore that the general principles of discovery are not displaced by the mere fact that a document that is sought to be discovered is subject to a duty of confidentiality. The fact a document is subject to confidentiality obligations, however, may be validly taken into account in determining whether or not the judicial discretion ought to be exercised in allowing discovery of the document.

[13] In our view, the learned judge was quite right to take that position. It is settled law that confidentiality itself is not a ground to resist discovery of a document. Leaving aside public interest privilege and legal professional privilege which are not relevant to the present proceedings, if the document is necessary for the fair disposal of the proceedings or is required by the demands of justice, discovery can be ordered notwithstanding confidentiality. However, in the exercise of discretion to order discovery,

regard must be taken of the fact that disclosure of confidential documents may involve a breach of confidence (see *Alfred Crompton Amusement Machines Ltd v. Customs and Excise Comrs (No. 2)* [1973] 2 All ER 1169; *Science Research Council v. Nasse; BL Cars Ltd (formerly Leyland Cars) v. Vyas* [1979] 3 All ER 673; *D v. National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589).

[14] We also do not think that the argument by learned counsel for Obnet, that to order discovery would be a collateral attack on the consent judgment, had any merit. We consider it implicit in the consent judgment that a court of law or an arbitral tribunal could order disclosure if warranted by the demands of justice. That this must be the case is due to the fact that there was no total prohibition in the disclosure of the settlement agreement. It could be disclosed with the consent of the parties. In any case, the consent order could not preclude the court from ordering disclosure as the court has an inherent power to prevent injustice (see *Law Mun & Ors v. Chua Lai Seng & Ors* [1984] 1 LNS 10; [1984] 2 MLJ 328. So disclosure through a court order was permissible in this case.

[15] Be that as it may, what remained of concern to us was that the State Government was not made a respondent to the discovery application. The net result is that the order for disclosure was made without regard to the views of the State Government. We accept that in a plain and obvious case where good reasons exist, discovery may be ordered against a party who has not been heard. However, the instant action was not such a case.

[16] The learned judge, with due respect, appears to have glossed over this issue. Learned counsel for TM submitted that the State Government would not be prejudiced by the discovery of the settlement agreement citing the case of *BA Rao & Ors v. Sapuran Kaur & Anor* [1978] 1 LNS 14; [1978] 2 MLJ 146. In that case, however, there was at least the affidavit of the Deputy Secretary General of the Ministry of Health setting out the reasons why they were objecting to the disclosure of the findings of the Committee of Enquiry set up by the Ministry of Health to inquire into the death of a particular deceased person.

[17] In the same context, we noted that the issue of prejudice was at the forefront of the mind of the learned arbitrator who stated at p. 4 of his decision:

> But what concerns me most in this application for Discovery is the peculiar position of the Selangor State Government, a party to the Settlement Agreement and also the Consent Judgment. The Claimant's Counsel stated that it was the Selangor state Government who insisted that the terms of the Settlement Agreement to be completely confidential. What then could have been the reason as to why the Selangor State Government was so concerned that the terms of the Settlement Agreement to be confidential and not to be disclosed to any third party.

> At this arbitration hearing the State Government is not represented. In my view the peculiar facts and circumstances of the State Government make me very cautious in deciding to exercise my discretion to grant the order of Discovery of the Settlement Agreement. I shall now explain what those peculiar facts and circumstances of the position of the Selangor State Government are, in respect of this application.

[18] After setting out the peculiar facts and circumstances of the State Government, which are not relevant for the instant appeal, the learned arbitrator went on to find at p. 5 of the decision:

> On my analysis on the above mentioned peculiar facts and circumstances I tend to believe that there must be some very serious provisions in the Settlement Agreement that the Selangor State Government do not wish the public to know. Having regards to the fact that it was the Selangor State Government who insisted the Settlement Agreement to be confidential and not to be disclosed to any third party and that the Selangor State Government is not represented at this tribunal hearing I arrive at the conclusion that grave injustice would be caused to the Selangor State Government if I were to make an order of Discovery of the said Settlement Agreement.

[19] Perhaps the learned arbitrator had in mind O. 24 r. 15 of the Rules of Court 2012 which limits disclosure if it was injurious to the public interest (see also *BA Rao & Ors v. Sapuran Kaur & Anor* [1978] 1 LNS 14; [1978] 2 MLJ 146; *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* [2016] 3 CLJ 19; [2016] 1 LNS 35; [2016] 1 MLJ 733). In the context of injury to public interest, the House of Lords in *Conway v. Rimmer and Another* [1968] 1 All ER 874 held that disclosure could only be ordered if the risk of injury to the public interest is outweighed by the injury to the public interest in the administration of justice. Since the State Government was not a party, it remains uncertain if they could rely successfully on this public interest privilege or immunity, as it is sometimes referred to, to oppose disclosure.

[20] Now, although the State Government was not a party to the said arbitration proceedings, there appeared to be no impediment to the State Government being made a respondent to the disclosure application in the High Court. It was no answer to say that the State Government could have applied to intervene in the disclosure proceedings. Having had notice of the learned arbitrator's concerns about the prejudice to the State Government, it was prudent for the State Government to be added as a respondent (see *Kheng Chwee Lian v. Wong Tak Thong* [1983] 2 CLJ 191; [1983] CLJ (Rep) 195 at 200). In our view, the failure to do so, in the circumstances, disentitled TM to the order for discovery.

[21] The next ground of challenge which merited consideration was a jurisdictional issue. The application for discovery was made pursuant to s. 11 of the AA 2005. For convenience, s. 11 is set out as follows:

> 11. Arbitration agreement and interim measures by High Court
>
> (1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for:
>
> (a) security for costs;
>
> (b) discovery of documents and interrogatories;
>
> (c) giving of evidence by affidavit;
>
> (d) appointment of a receiver;
>
> (e) securing the amount in dispute, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;
>
> (f) the preservation, interim custody or sale of any property which is the subject-matter of the dispute;
>
> (g) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and
>
> (h) an interim injunction or any other interim measure.
>
> (2) Where any party applies to the High Court for any interim measure and an arbitral tribunal has already ruled on any matter which is relevant to the application, the High Court shall treat any findings of fact made in the course of such ruling by the arbitral tribunal as conclusive for the purposes of the application.
>
> (3) This section shall also apply in respect of an international arbitration, where the seat of arbitration is not in Malaysia.

[22] As noted by the learned judge, s. 11(2) of AA 2005 effectively provides that the High Court is bound by the findings of fact by the arbitrator. The findings of fact by the learned arbitrator in the arbitration proceedings relevant to the discovery application were alluded to earlier in paras. [17] and [18] of this judgment. It was conceded all round, including by the learned judge, that the learned arbitrator had made findings of fact. Having accepted as such, the learned judge, however, concluded that the learned arbitrator had adopted the wrong test.

[23] In this respect, we are constrained to observe that although the learned judge accepted that he was bound by the findings of fact relevant to the discovery application, he nevertheless, in our respectful view, treated the discovery application as if it was an appeal. With respect, the learned judge was bound by the learned arbitrator's finding that the disclosure of the

settlement agreement ought not to be allowed as such disclosure would be prejudicial to the State Government. Whatever the merits of such a finding, the High Court had no jurisdiction to interfere.

[24] In this regard, it is pertinent to observe that the policy behind AA 2005 is one of minimal court intervention in arbitration proceedings as stated by s. 8 of AA 2005: "No court shall intervene in matters governed by this Act except where so provided in this Act". In keeping with this policy, s. 11 of AA 2005 must be read as intending to support the arbitral process and not, as the learned judge here appears to have done, to exercise some kind of supervisory role over arbitration proceedings.

[25] It should also not be overlooked that, in many instances, arbitration proceedings are undertaken by arbitrators who are not legally trained and therefore greater flexibility rather than rigidity to procedural matters is required barring the one fundamental principle that parties in the arbitral process must be given a fair opportunity of being heard and presenting their case.

[26] It must then follow that in principle s. 11 of AA 2005 is designed to support and facilitate the arbitral process and not to displace it. The approach, in the context of s. 11, must be not to encroach on the procedural powers of the arbitrators but to reinforce them (see *Channel Tunnel Group Ltd v. Balfour Beatty Construction* [1993] AC 334). As stated by s. 11 itself, the relief sought must be of an interim nature and, by implication, not permanent. It is plain that the interim measures are not intended to displace the powers of the arbitrator. They are certainly not there for the High Court to exert some supervisory function over the arbitral process. In the circumstances, the learned judge ought to have declined to order discovery.

[27] The final ground of challenge which warranted consideration was whether the settlement agreement was necessary or relevant to the arbitration proceedings. Except for noting that TM was concerned about Obnet making double claims which are not allowed by law, the learned arbitrator did not consider this issue in any depth. The learned judge, on the other hand, concluded that the settlement agreement was relevant as it could show how much of the loss that Obnet was seeking from TM in the arbitration had already been compensated by the State Government so that there is no compensation twice over for the same loss.

[28] We do not think the learned judge is wrong in the view that he took as long as it could be established that Obnet's claim in the arbitration proceedings for loss and damage is the same or largely similar to Obnet's claim against the State Government which ended with the settlement agreement and the consent order. In this respect, the parties were at odds as to whether this was indeed the case. We do not consider it appropriate to make a determination of this issue lest we be accused of usurping the arbitral process. This issue is best left to the arbitral tribunal.

[29] Even so, in taking this position, we were mindful of the principles of recovery as set out in the English cases of *Jameson (executors of Jameson (decd)) v. Central Electricity Generating Board (Babcock Energy Ltd, third party)* [1999] 1 All ER 193 and *Heaton v. Axa Equity and Law* [2002] 2 All ER 961. The overriding principle is that the release of one concurrent tortfeasor did not have the effect in law of releasing another concurrent tortfeasor and the release of one contract-breaker did not have the effect of releasing a successive contract-breaker. It all depends on whether the full measure of damages has been received by the claimant which may then disentitle him to maintain a claim against the other tortfeasor or contract-breaker. In determining whether full measure of damages has been received, a distinction must be made between an action which culminates in a court judgment and one which culminates in a compromise. As we have said, these are matters for the consideration and determination by the learned arbitrator.

[30] Our concern in this regard, however, is whether it is necessary to look at the settlement agreement to ascertain whether there is going to be double recovery or whether there exist some other means of doing so. In this context, in the *Nasse* case, Lord Wilberforce observed (p. 680):

> (4) The ultimate test in discrimination (as in other) proceedings is whether discovery is necessary for disposing fairly of the proceedings. If it is, then discovery must be ordered notwithstanding confidentiality. But where the court is impressed with the need to preserve confidentiality in a particular case, it will consider carefully whether the necessary information has been or can be obtained by other means, not involving a breach of confidence.

[31] In the instant case, it is our respectful view that any information as to whether the full measure of damages has been received by Obnet can be obtained through the examination of witnesses of Obnet in the arbitral proceedings without the need to reveal the whole of the settlement agreement. If there is wilful refusal by the witnesses to do so, TM would then be at liberty to seek from the learned arbitrator an order to look at the documents. If necessary for the fair disposal of the case, the learned arbitrator in those circumstances could order disclosure subject to the appropriate safeguards. This would be in keeping with the approach and mind-set to preserve confidentiality and to order discovery with the protective measures only as a last resort. For this reason as well, we considered that it was unnecessary to order disclosure at the time it was sought.

Conclusion

[32] In the circumstances, and for the reasons we have given, we were persuaded that the learned judge had fallen into grave error in ordering discovery. The appeal was accordingly allowed and the order of the High Court set aside with costs here and below of RM23,000 subject to payment of allocator fees. Deposit to be refunded.